IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AVERY LAMARR GILBERT, Appellant.	No. 39052-3-II UNPUBLISHED OPINION

Houghton, J. — Avery Gilbert appeals his conviction for second degree robbery on grounds of prosecutorial misconduct and ineffective assistance of counsel. He raises additional claims pro se. We affirm.

FACTS

On October 21, 2008, Gilbert entered the Tacoma Pipe and Tobacco store. He asked to see a replacement pipe stem. Daniel Slater, a store employee, handed one to him. Gilbert then asked to see a second replacement stem and Slater complied. At some point, Gilbert returned one of the stems while keeping the other.

Gilbert asked to take the pipe stem outside. Slater told him no and then asked for the stem back, repeating the request at least three times. Gilbert said no and left the store with the stem but without paying for it.

John Larson, another employee, observed these events from security cameras inside and

outside the store. He pursued Gilbert, found him leaving a nearby grocery store, and shouted for him to stop.

Gilbert approached Larson. Larson asked four times for the return of the merchandise. Gilbert told Larson to "get out of his face" or he would "blow his head off." 2 Report of Proceedings (RP) at 31. Larson shouted for one of his employees to call 911 because Gilbert had just threatened to shoot him. Gilbert returned the pipe stem and fled the scene. Police officers responded and apprehended Gilbert.

The State initially charged Gilbert with one count of first degree robbery. A jury heard the matter.

At trial, before the State rested its case in chief, it moved to amend the information to reduce the charge to second degree robbery. The trial court deferred ruling on the motion until after the State rested. When the State rested, Gilbert responded with a motion to dismiss. The trial court denied Gilbert's motion and allowed the State to amend the information.

During its initial and rebuttal closing arguments, the State argued that the jury had to have a "reason to doubt" the State's charges and that reasonable doubt is "doubt for which a reason exists." 3 RP at 178, 190. The State also argued that it had to prove only that the crime occurred " 'on or about' " the specified date because the charging document had to provide sufficient information for Gilbert to "go get an alibi" or defend himself. 3 RP at 179. The State also commented that many of the elements of the crime were undisputed and that there was no reason to doubt them. Finally, the State commented that Larson's credibility was crucial to its case and asked the jury to consider whether its witnesses were being "truthful" or whether they were

"lying." 3 RP at 190, 216.

The jury convicted Gilbert of second degree robbery. He appeals.

ANALYSIS

Prosecutorial Misconduct

Gilbert contends that the prosecutor committed misconduct during closing argument by misstating the law, shifting the burden of proof to the defendant, improperly commenting on the evidence, and implying that an acquittal depended on the jury's determination that the State's witnesses were lying. He also argues that the cumulative effect of this misconduct requires reversal.

A defendant alleging prosecutorial misconduct must show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

"Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)) (internal quotation marks omitted).

First, Gilbert asserts that the prosecutor's comments during closing argument that (1) the

jury had to have a "reason to doubt" the State's charges and (2) reasonable doubt is "doubt for which a reason exists" improperly stated the law and shifted the burden of proof to him. 3 RP at 178, 190. Gilbert's argument does not persuade us because the "doubt for which a reason exists" language derives verbatim from Washington Pattern Jury Instruction 4.01. Clerk's Papers (CP) at 36; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 401, at 85 (3d ed. 2008). Our Supreme Court has repeatedly approved this jury instruction as an accurate definition of reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 308-09, 317, 165 P.3d 1241 (2007). The prosecutor's comments accurately stated the law and did not shift the burden of proof to Gilbert. Accordingly, his argument fails.

Second, Gilbert asserts the prosecutor's comments during closing argument that the State had to provide sufficient information to Gilbert to "go get an alibi" or defend himself implicitly shifted the burden to him. 3 RP at 179. A prosecutor may touch upon a defendant's exercise of a constitutional right, provided the prosecutor does not " 'manifestly intend[ ] the remarks to be a comment on that right.' " *Gregory*, 158 Wn.2d at 807 (quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)). When viewed in context, the comments were intended to explain to the jury why the State had to prove that the alleged crime occurred " 'on or about' " the date specified in the charging documents. 3 RP at 179. Gilbert's argument fails.

Third, Gilbert asserts that the prosecutor's repeated comments that certain elements were "undisputed" and that there was no reason to doubt them improperly commented on the evidence. Appellant's Br. at 8, 11. Again, Gilbert's argument does not persuade us because a prosecutor may comment that evidence is undisputed. *State v. Morris*, 150 Wn. App. 927, 931, 210 P.3d

1025 (2009).

Furthermore, the State provided multiple witnesses who testified without dispute that the crime occurred in Washington, that it occurred on the correct date, and that Gilbert was the correct defendant. That there was no reason to doubt these elements was a reasonable inference the prosecutor could argue from the evidence. Gilbert's argument fails.

Fourth, Gilbert asserts the prosecutor's comments that "[a]bsent John Larson's testimony[,] the verdict has to be not guilty" and references to whether two witnesses seemed "truthful" or were "lying" improperly implied that the jury had to find the state's witnesses were lying in order to acquit him. 3 RP at 196, 190, 216. It is misconduct for a prosecutor to argue that the jury must find the State's witnesses are lying or mistaken to acquit a defendant. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995). Here, however, the prosecutor argued that the jury had to find Larson's testimony credible in order to convict Gilbert. The prosecutor's comments merely stated the obvious fact that the jury had to find the State's witness credible in order to conclude it had met its burden of proving guilt beyond a reasonable doubt.

Furthermore, when viewed in context, the references to whether witnesses seemed "truthful" or "lying" only asked the jury to consider the consistency of their testimony with other testimony and evidence, including a surveillance camera recording of the incident. 3 RP at 190, 216. The State never argued that a determination of truthfulness was necessary to acquit, and it even explicitly acknowledged that the jury could decide that some portions of testimony were mistaken or untruthful and still conclude that necessary portions were credible. Gilbert's argument fails.

Finally, Gilbert asserts the cumulative prejudicial effect of the prosecutor's comments requires reversal and a new trial. Because the prosecutor made proper comments, this argument fails as well.

Ineffective Assistance Of Counsel

Gilbert also contends that defense counsel provided ineffective assistance. He asserts that counsel's failure to object to any of the above comments was deficient and prejudiced him.

A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance claim. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because the prosecutor's comments were proper, Gilbert cannot demonstrate prejudice and his argument fails.

Statement of Additional Grounds

Gilbert raises additional claims pro se in his statement of additional grounds.[1] He argues generally that inconsistencies in the testimony of the State's witnesses, particularly Larson, undermine their credibility. We defer to the fact finder on issues of witness credibility and do not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Gilbert also argues that the trial court erred by allowing the State to amend the information. Here, the State moved to amend the information before it rested its case in chief. It may amend the information even after resting its case in chief if the amendment is to a lesser degree of the same crime or a lesser included offense. *State v. Quismundo*, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) (citing *State v. Vangerpen*, 125 W.2d 782, 789, 888 P.2d 1177 (1995)).

[1] RAP 10.10(a).

The State amended the information from first degree robbery to second degree robbery, a lesser degree of the same crime, and the trial court did not err in allowing the amendment. *State v. Barker*, 103 Wn. App. 893, 899, 14 P.3d 863 (2000). Gilbert's pro se arguments all fail.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, J.

We concur:

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Van Deren, C.J.

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Penoyar, J.